United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1323

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

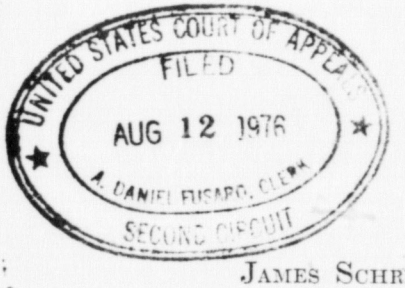
against

JACKSON D. LEONARD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT JACKSON D. LEONARD



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REPLY BRIEF OF APPELLANT JACKSON D. LEONARD

Introduction

Appellant Jackson D. Leonard ("Leonard") submits this brief in reply to the government's brief in response to Leonard's appeal from the decision of the district court denying Leonard's motion for a new trial on the ground of newly discovered evidence. Leonard's appeal is based on the fact that subsequent to the trial appellant was advised by and obtained the affidavit of Eva Brooke, the government's key witness, that the government had obtained her testimony by means of false and improper threats which the government had failed to disclose to Leonard at trial.

As we shall show below, the government has wholly failed to justify its misconduct, and has sought instead to minimize the significance of its improper acts by: (a) denying that Mrs. Brooke's testimony was crucial to its case (G.Br. 12)*, although it did not challenge the accuracy of Mrs. Brooke's sworn allegation (18a) that prior to trial the prosecutor told her that she had "crucial" testimony and therefore was the "key witness"; (b) urging this Court not to reverse and grant a new trial unless the new evidence would create a "reasonable doubt" as to Leonard's guilt (G.Br. 11), despite the fact that this Court has clearly stated that when there is governmental misconduct, a new trial should be granted if the new evidence is merely favorable to the defense (see, e.g., United States v. Miller, 411 F.2d 825 (2nd Cir. 1969), and United States v. Kahn, 472 F.2d 272 (2d Cir. 1973)); (c) contending that Leonard

* "G.Br." refers to the government's brief, "D.Br." to defendant-appellant's principal brief, and "GX" and "DX" to the government's and defendant's trial exhibits, which are printed in the exhibit volume ("E") of the appendix filed in Leonard's appeal from his conviction. References to the appendix filed in this appeal are to the page number followed by the letter "a".

failed to use due diligence in discovering the government's misconduct (G.Br. 15-16); and (d) asserting that the Court has already considered and rejected Leonard's claim of governmental misconduct (G.Br. 10), despite the fact that the new evidence presented to the district court was not obtained until March 3, 1976 (17a), over six months after this Court denied Leonard's appeal from his conviction and almost four months after this Court reaffirmed its decision on rehearing.

Argument

POINT I

THE THREATS MADE TO MRS. BROOKE WERE FALSE AND, AT THE TIME THEY WERE MADE, THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN THAT THEY WERE FALSE AND THAT IT LACKED AUTHORITY TO OBTAIN THE "ARREST AND EXTRADITION" OF MRS. BROOKE, WHO WAS COMPLETELY INNOCENT OF ANY WRONGDOING

Although the government does not deny that it threatened Eva Brooke, its key witness against Leonard, with arrest and extradition if she, a British citizen and resident, failed to come to the United States from England to testify against Leonard, the government seeks to justify its conduct by claiming that it believed, in good faith, that it had the power to compel her to testify (G.Br. 13). However, an examination of the facts and the laws on which the government purports to rely readily reveals that the government knew, or should have known, that the threats it made to Mrs. Brooke were false, that it lacked authority to obtain the arrest and extradition of Mrs. Brooke, who was completely innocent of any wrongdoing, and that such threats would necessarily have the effect of creating a serious obstacle to cross-examination.

In the first place, there is nothing in the record that shows that Mrs. Brooke had any legal duty to come to the United States from England to testify against Leonard.

While there is evidence that Mrs. Brooke was subpoenaed in Oklahoma in November or December 1974 (17a), at that time the trial was scheduled for December, 1974 and the subpoena presumably required her to appear in court on that date.* The trial date, however, was subsequently adjourned several times and was ultimately set for January 13, 1975 (2a, 30a). Since the record is silent as to whether the subpoena commanded Mrs. Brooke to appear on the ultimate adjourned date of trial, there is no basis for concluding that Mrs. Brooke violated the terms of the subpoena when she refused to come to New York.

In an attempt to overcome this serious absence of proof the government has taken the extraordinary step of supplementing the record, without first seeking or receiving the permission of this Court or the consent of Leonard, by quoting what it claims to be the subpoena served on Mrs. Brooke (G.Br.4). In view of the fact that the government has not filed the subpoena with this Court and has refused to show a copy of it to Leonard's counsel, we respectfully submit

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* Since the government has never filed the subpoena and has refused to show a copy of it to Leonard's counsel, we are forced to speculate as to its terms.

that this Court should either refuse to consider the government's untimely proffer of proof or remand the case to the district court with a direction to hold a hearing on the question of the circumstance surrounding the subpoenaing of Mrs. Brooke.* However, even if the Court takes notice of the alleged language of the alleged subpoena, it is clear that the cited passage falls far short of establishing that Mrs. Brooke was under any obligation to appear on the adjourned trial date.**

Moreover, even if the subpoena were still valid on January 14, 1975, the date on which the government procured from the district court a Letter Rogatory requesting the

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* On August 5, 1976, appellate counsel spoke by telephone with Assistant U.S. Attorney Audrey Strauss and requested an opportunity to inspect the subpoena allegedly served on Mrs. Brooke since the government allegedly quoted from it at G.Br.4. However, Assistant U.S. Attorney Strauss advised that although the subpoena was not part of the record and despite the fact that the government allegedly quoted it in its brief, the U.S. Attorneys' office would not make it available because the request (1) should have been made earlier and (2) would require the search of five transfiles of documents, a search the government was unwilling to undertake at this "late date".

** The cited language, which Leonard urges the Court to ignore as not properly before it, warns the person served that he should not leave the jurisdiction of the Court. However, since it does not state how long that prohibition is to last, a reasonable construction would be that the restriction terminates on the date the witness is commanded to appear to testify.

English courts to arrest and extradite Mrs. Brooke (22a-25a), and even if Mrs. Brooke were obligated to honor it, the government's suggestion, which it relegated to a footnote, that Mrs. Brooke, had she not yielded to the government's threats, could have been arrested and extradited for "contumacy" (G.Br. 12n), highlights the fact that there was no conceivable basis for the government to believe it could require Mrs. Brooke to come from England to the United States to testify against Leonard.

The British Extradition Act of 1870 (D.Br., Addendum D) clearly provides that the only British citizens subject to arrest or extradition at the request of a foreign state are those accused or convicted of an extraditable crime*, and the only such crimes listed in the Act are murder, rape, arson, kidnapping, forgery, piracy and similar and related felonies. "Contumacy" is not an extraditable offense.

Indeed, the government clearly misconstrues both the meaning of the term "contumacy" and the intent of the

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* Only a "fugitive criminal" who is accused or convicted of having committed an "extradition crime" may be arrested or extradited, §§ 3, 6, 7, 8, 9 and 10 of the British Extradition Act of 1870, and §26 of the Act defines a "fugitive criminal" to be a person accused or convicted of an "extradition crime", which the section defines to be the crimes set forth in a specified schedule to the Act.

provision in Section 26 of the British Extradition Act of 1870 that a person "convicted for contumacy" is to be treated as an "accused person" rather than as a "convicted person".

In certain civil law countries, a defendant who fails to appear for his trial can be tried and convicted in absentia. Such a conviction is known as a "conviction par contumace", and, unlike a conviction following a trial at which the defendant is present and has an opportunity to defend himself, can be set aside if the defendant subsequently appears and requests a new trial. See, Athanassiadis v. Government of Greece, 3 All E.R. 293 (House of Lords 1967).

Consequently, the purpose of Section 26 is to make plain that a person convicted of a crime in absentia will, for the purposes of the British Extradition Act of 1870, be treated as a person accused of the act for which he was so convicted. This means that before he will be arrested or extradited the nation so requesting must proffer to the appropriate British authorities "such evidence...as..would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England..." Section 10 of the British Extradition Act of 1870.

Since the failure to honor a subpoena is not an extraditable offense under either the British Extradition Act of 1870 or the Extradition Treaty between the United States and Great Britain (D.Br., Addendum B), Mrs. Brooke would not be subject to arrest or extradition even if the United States had a procedure that permitted her to be convicted "for contumace".

Similarly, the argument (G.Br. 13) that the government's "good faith" is demonstrated by its submission to the district judge of a Letter Rogatory which refers to the use of such compulsion "as British law permits" is equally without merit since the Letter Rogatory states that the authorities on which the government relies for its request that the British courts arrest and extradite Mrs. Brooke are the British Extradition Act of 1870*, which we have just shown is wholly inapplicable, and the British Tribunals Evidence Act of 1856, which covers only civil matters and simply gives English courts the power to take testimony in England at the request of a foreign court. (24a.)

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* Indeed, while the government now seeks to rely on the portion of the British Extradition Act of 1870 dealing with "contumacy" (G.Br. 12n), the Letter Rogatory invokes that Act only insofar as it bears on the proper construction of the Foreign Tribunals Evidence Act of 1856, which, as we note below, pertains only to civil and not to criminal matters.

Consequently, there is no justification whatever for the government's threatening Mrs. Brooke, and no excuse for its failure to disclose its threats to Leonard or the district court. Therefore, Leonard's claim that he is entitled to a new trial must be viewed within the context of a case where the government has acted improperly.*

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* As we shall show below, in Point II, infra, the test for a new trial is substantially more favorable for a defendant when he has established governmental misconduct.

POINT II

MRS. BROOKE'S TESTIMONY WAS CRUCIAL TO THE GOVERNMENT'S CASE, AND DISCLOSURE OF THE GOVERNMENT'S THREATS WOULD HAVE AIDED THE DEFENDANT'S CASE

Although the government conceded below that Mrs. Brooke was its key witness and that her testimony was crucial to its case against Leonard*, it now, apparently fearing that Leonard has established governmental misconduct and is entitled to a new trial, has sought to undermine the effect of its concession by suggesting (G.Br. 12) that Mrs. Brooke's testimony really was not all that important and that the proof of Leonard's guilt was overwhelming even without Mrs. Brooke.

The truth, however, is quite to the contrary. As discussed in great detail in Leonard's principal brief on this appeal (D.Br. 9-15), while the government was able to offer substantial evidence that Leonard omitted certain

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* Although Leonard's motion papers in the district court expressly stated that Mrs. Brooke was "the key government witness on the issue of 'wilfulness'", and her testimony "had an absolutely devastating effect" and was "the turning point in the trial" (Affidavit of James Schreiber in support of Defendant's motion for a new trial, paragraphs 1 and 15), the government's responding papers (Affidavit of W. Cullen MacDonald in opposition to Defendant's motion for a new trial) did not challenge Leonard's assessment of the importance of Mrs. Brooke's testimony to the government's case.

amounts from his 1967 and 1968 federal income tax returns, proof of wilfulness was both circumstantial and equivocal.

Moreover, the government's presentation of the evidence involving the allegedly omitted income was very confusing, with over one hundred trial exhibits, most of which were checks and invoices, and no charts or summaries to assist the jury in following the progress of funds from Union Carbide Corporation to Leonard to Treadwell Corporation to Leonard Process Co., Inc. and back to Leonard, a task made even more difficult by the fact that the overwhelming majority of the payments were unquestionably reported.

As a consequence, the government was forced to rely on "similar act" evidence to establish wilfulness. And, as an earlier panel of this Court concluded, the similar act evidence other than the testimony of Mrs. Brooke was at best tenuous and of doubtful admissibility. United States v. Leonard, 524 F.2d 1076, 1092 (2nd Cir. 1975).

Mrs. Brooke's testimony, however, was simple, clear and devastating: Leonard had lied when he declared in his 1971 federal income tax return that he had no foreign bank accounts. Consequently, it was an easy step for the jury to take to conclude that he knowingly filed false federal tax returns in 1967 and 1968.

Therefore the possibility that knowledge of the government's threats might have aided the defense in its cross-examination of Mrs. Brooke makes the government's failure to disclose those threats of the highest importance.*

The government seeks to avoid the logical consequences of its misconduct by arguing that the proper standard for testing Leonard's claim is whether the new evidence raises a "reasonable doubt" as to Leonard's guilt (G.Br. 11), and claiming that it does not because Mrs. Brooke has not recanted her testimony (G.Br. 12). However, an examination of the applicable law and the circumstances surrounding Mrs. Brooke's testimony readily discloses the fallacies in the government's contentions.

In the first place, it is well-established that where there is deliberate government misconduct, such as was clearly present in this case, "a new trial is warranted if the [new] evidence is merely material or favorable to the defense." United States v. Kahn, 472 F.2d 272, 287 (2nd Cir. 1973). See also, Giglio v. United States, 405 U.S. 150 (1972), United States v. Morell, 524 F.2d 550 (2nd Cir. 1975) and United States v. Seijo, 514 F.2d 1357 (2nd Cir.

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* The use which defendant might have made of the threats is discussed below at 18-19.

1975) and United States v. Miller, 411 U.S. 825 (2nd Cir. 1969). And, contrary to the government's contention, the Supreme Court's recent decision in United States v. Agurs, 44 U.S.L.W. 5013 (June 24, 1976), a case that did not involve governmental misconduct, cannot reasonably be regarded as abandoning or discrediting, sub silentio, the rule that a defendant who shows that the government acted improperly does not have to prove the newly discovered evidence would have led the jury to reach a different result.

Secondly, there is no support for the government's contention that proof of the threats would have been improper. Government coercion of a witness can always be brought to the attention of the jury. See, e.g., United States v. Badalamente, 507 F.2d 12 (2nd Cir. 1974), cert. denied, 421 U.S. 911 (1974).

Finally, the fact that Mrs. Brooke has not recanted her testimony does not mean either that her trial testimony was true* or that disclosure of the government's threats

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* The government makes much of the fact that neither Leonard nor his wife has heretofore challenged the accuracy of Mrs. Brooke's testimony (G. Br. 8). Leonard, of course, invoked his constitutional privilege not to testify. Fifth Amendment, United States Constitution. Mrs. Leonard, in response to the government's statement, has executed an affidavit denying that the alleged conversation relating to Swiss accounts ever took place, and Leonard has moved the Court for leave to file his wife's affidavit.

would not have adversely affected her testimony.

It is unrealistic to expect Mrs. Brooke to voluntarily confess that her testimony was false. Perjury, after all, is a serious crime, punishable by a fine of up to $2000 and imprisonment of up to five years, 18 U.S.C. §1621, and even the knowledge that her testimony was induced by government coercion may be insufficient to reassure Mrs. Brooke that she can now safely disown her trial testimony.*

Moreover, there is strong, though circumstantial evidence, that her trial testimony was signficantly colored by government threats.

Although Mrs. Brooke testified with seeming certainty that in the summer of 1971 she and her late husband spent an evening with Leonard and his wife in New York City (86a-87a) during which Leonard, to induce her husband to join him in business, offered him a salary of $100,000 a year, half to be placed in a Swiss bank account, and told Mrs. Brooke and her husband that he himself had a Swiss account (87a-88a), Mrs. Brooke's handwritten first draft of an affidavit (DX AF at E. 596-598), written in or about May 1974, which purported to recount her husband's

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* Perjury is, it should be noted, an extraditable offense under the Extradition Treaty between the United States and Great Britain. (Art. 3, D.Br., Addendum B, p. 39)

business relations with Leonard*, made no mention of Leonard's alleged statement that he personally had a Swiss bank account. (Indeed, her handwritten affidavit states explicitly that she and Mrs. Leonard were "only barely aware of our husband's conversations!" [Exclamation point in the original] [DX AF at E. 597]) Moreover, her second draft (DX AG at E. 600-605) states the meeting took place in November, 1970 not in the summer of 1971.**

The final version of the affidavit (DX AE), however, prepared by the attorneys for Kerr-McGee Chemical Corp. ("Kerr-McGee"), the employer of Mrs. Brooke's late husband, the payer of the pension that she was living on, and the defendant in a multi-million dollar civil litigation brought by Leonard for misappropriation of a highly valuable

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* Mrs. Brooke testified that she was asked by Kerr-McGee Chemical Corp. to record her recollections of these discussions because Kerr-McGee intended to use them in a civil litigation against Leonard (116a, 120a-121a).

** The difference in dates is crucial since the period (November, 1970 and the summer of 1971) spans two tax years -- 1970 and 1971 -- and it was not until the 1971 tax year that taxpayers were required to state in their tax returns whether or not they had a foreign bank account and Leonard's 1970 tax return is not in evidence. If Leonard's statement about having a Swiss account was made in 1970, there is no proof that he made a false statement in his 1971 tax return when he denied having such an account.

new chemical process developed by Leonard for the manufacture of titanium dioxide pigment (77a), added the comment that Leonard admitted having a Swiss account and changed the date of the meeting to June, 1971. And it was obviously because of this latter affidavit that the government sought so tenaciously to compel Mrs. Brooke to repeat the version of the conversations with Leonard that she had given to Kerr-McGee officials almost a year before -- a version which the government told her was "crucial" to its case.

It is very likely that because Mrs. Brooke was told by the government that she was to be a "key witness" and that her testimony was "crucial" to the case against Leonard (18a), and because the government threatened to have her arrested and extradited unless she came to New York to testify, she was afraid* to disown the statement which Kerr-

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* Leonard's trial counsel has noted, in an affidavit submitted in support of Leonard's motion for a new trial, that:

> "During the course of Mrs. Brooke's testimony and during my interview with her she appeared to be close to tears and was obviously emotionally upset." (66a)

The government somewhat disingenuously quotes only a portion of the transcript of the June 24, 1976 hearing before Judge Owen in which Judge Owen expresses an opinion as to whether Mrs. Brooke appeared frightened, but failed to include the full context of what Judge Owen stated. (G.Br. 7-8) For the full statement of Judge Owen, see 35a-36a and 51a-52a.

McGee, to discredit Leonard, had obviously added to her personal, handwritten recollections. Consequently, the pressure on her to adhere to her previous statements may have been no less than that exerted on the hynotized witness in United States v. Miller, 411 F.2d 825, 830-832 (2nd Cir. 1969), where Judge Friendly observed:

> "...a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence might have led to an acquittal or a hung jury; and that such a possibility exists here.
>
> * * *
>
> ...as the record stands, the hypnosis had arguably placed at least some obstacle in the way of one of the most valuable protections accorded Miller by the Sixth Amendment -- the possibility that the sanctity of the oath and effective cross-examination might lead [the hypnotized witness] to recant his identification or at least admit doubt. The defense could and very likely would have made this the capstone of its attack on the crucial witness for the prosecution -- with what effect we cannot confidently say."

And John J. Tigue, Jr., Leonard's trial counsel, has executed an affidavit, in support of Leonard's motion for a new trial, in which he states:

> "I have tried approximately 20 criminal cases in the last six years, as an Assistant U.S. Attorney in the Southern District of New York, as assigned defense counsel and as retained defense counsel. While I recognize that any judgment on matters of this sort is sub-

jective, it is nevertheless my considered judgment that had I known of the alleged threats to Mrs. Brooke, and had I been permitted to cross-examine her broadly on this point, there is a significant possibility that the jury would have reached a different result. I do not say this lightly. Leonard's 'wilfulness' was a critical issue and her testimony on this point cannot be underestimated [sic] [overestimated]. Such cross-examination would have lent substantial support to an argument I made at trial, namely, that the IRS was harassing Mr. Leonard and may have been 'out to get him'". (62a-63a)

POINT III

LEONARD'S TRIAL COUNSEL, WHO HAD NO KNOWLEDGE OF THE THREATS, EXERCISED DUE DILIGENCE. HE WAS MISLED BY MRS. BROOKE WHO, APPARENTLY INTIMIDATED BY THE GOVERNMENT'S THREATS, WITHHELD THE FRIGHTENING CIRCUMSTANCES SURROUNDING HER TESTIMONY

The government's contention that Leonard's trial counsel could have easily learned of the government's threats had he asked Mrs. Brooke the "right questions" (G. Br. 16) is frivolous.

As we show in great detail in our principal brief herein (D. Br. 22a-25a), Leonard's trial counsel did ask the "right questions". The problem was that Mrs. Brooke was apparently so in fear of the government that she not only did not "volunteer" the information that she had been coerced, but in fact advised him and testified that she was present and testifying at the trial in response to a subpoena, a response which naturally gave Mr. Tigue no reason to suspect that she had been threatened with arrest and extradition.

Moreover, it is respectfully submitted that it would be "inconsistent with the correct administration of criminal justice in the federal courts", United States v. Miller, supra, 411 U.S. at 832, to permit the government to deny a defendant a fair trial solely because his counsel failed to discover the government's misconduct until after the trial was over.

POINT IV

THIS COURT HAS NOT PREVIOUSLY CONSIDERED OR REJECTED LEONARD'S CLAIM BASED ON MRS. BROOKE'S AFFIDAVIT

The government's contention (G. Br. 10) that Leonard's claim of governmental misconduct was considered and rejected by this Court in his appeal from his conviction is totally untrue, as an examination of this Court's earlier opinion and the facts readily proves.

In Leonard's initial appeal he raised the question of whether Mrs. Brooke might have been intimidated, but was unable to introduce any concrete evidence of such threats, and was forced to argue that such an inference could be drawn from the "arrest and extradition" clause of the Letter Rogatory discovered for the first time on appeal.

In declining to reverse Leonard's conviction, the Court emphasized that the argument had not been raised in the district court and that the allegations were based on speculation, not concrete evidence of governmental misconduct. United States v. Leonard, supra, 411 F.2d at 832.

It was not until March, 1976, some six months later, that Leonard's counsel learned from Mrs. Brooke the circumstances surrounding her testifying, and obtained an affidavit from her detailing the government's actions (17a).

By that time, Leonard had already petitioned the United States Supreme Court for a writ of certiorari. Because the petition for certiorari contained substantially the same arguments with regard to Mrs. Brooke that Leonard had made in this Court, Leonard, on the advice of counsel, and to avoid the risk that the Supreme Court would also reject his contention for lack of evidence of misconduct, filed a supplemental petition which included Mrs. Brooke's affidavit as an exhibit.*

The Supreme Court, however, denied certiorari.** Consequently, this is Leonard's first opportunity to obtain appellate review of the question of whether the government's misconduct justifies granting him a new trial.

Under these circumstances, the denial of Leonard's appeal would, it is respectfully submitted, be inconsistent with this Court's duty to supervise the correct administration of criminal justice in the federal courts. United States v. Miller, 411 F.2d 825 (2nd Cir. 1969).

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* For a more detailed explanation, see 54a.

** The denial of certiorari, of course, is not a decision on the merits. Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J.)

CONCLUSION

The judgment of conviction should be reversed and Leonard granted a new trial.

Respectfully submitted,

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